Petition

81-1462

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No. ...
IN THE

Supreme Court of the United States

October Term, 1981

GREAT AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION, and CALIFORNIA GENERAL MORTGAGE SERVICE INC.,

Petitioners,

vs.

JOHN F. NALORE and NORMA L. NALORE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Question Presented.

When an action is brought in state court seeking to invalidate, on state grounds, an activity that is governed exclusively by preemptive federal law, but the complaint purports to be based upon state law, is the action removable to federal court?

Parties to the Proceedings.

The petitioners herein, defendants in the district court and appellees below, are Great American Federal Savings and Loan Association, which is referred to hereinafter by its former name, San Diego Federal Savings and Loan Association ("San Diego Federal") and California General Mortgage Service, Inc. ("California General").*

The respondents herein are John F. Nalore and Norma L. Nalore ("the Nalores"), who are purchasers of property subject to a deed of trust containing a "due-on-sale" clause of which San Diego Federal is beneficiary and California General is trustee.

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*Pursuant to Rule 28.1 of the Rules of this Court, the Court is hereby advised that the subsidiaries and/or affiliates of San Diego Federal (now Great American Federal Savings and Loan Association) are, in addition to California General, Financial Scene Inc., Franklin & Associates, and San Diego Federated Insurance Agency.

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vs.

JOHN F. NALORE and NORMA L. NALORE,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

I.
OPINION BELOW.

The decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") from which the within petition is taken, a copy of which is attached hereto at Appendix, pp. 1-3, is published at 663 F.2d 841 (9th Cir. 1981).[1]

The decision of the United States District Court for the Southern District of California ("the Southern District Court"), which is also unpublished, is set forth at Appendix, pp. 4-6.

[1]On the date that it was rendered, September 23, 1981, the Ninth Circuit ordered the decision to remain unpublished. On November 20, 1981, however, the Court ordered that the decision be published. The issues herein are closely related to a concurrently decided case, *Guinasso v. Pacific First Federal Savings & Loan Association*, 656 F.2d 1364 (9th Cir. 1981), *pet. for cert. docketed*, No. 81-1386 (U.S. Jan. 21, 1982).

II.
GROUNDS FOR JURISDICTION.

This is a petition for writ of certiorari to review the judgment (or decision) of the Ninth Circuit filed September 23, 1981. A timely petition for rehearing with respect to that decision was denied by the Ninth Circuit on December 8, 1981. (See Appendix, p. 7.) This Court has plenary jurisdiction to review such a decision under 28 U.S.C. §1254(1).

III.
GERMANE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS.

The constitutional provisions, statutes and regulations germane to the within proceeding are (1) Article VI, Cláuse 2 of the United States Constitution (''the Supremacy Clause''); (2) Article I, Section 8, Clause 3 of the United States Constitution (''the Commerce Clause''); (3) Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(a); (4) 12 C.F.R. §545.8-3(f) and (g); (5) California Civil Code §711; (6) 28 U.S.C. §1331; (7) 28 U.S.C. §1337; and (8) 28 U.S.C. §1441.[2]

IV.
STATEMENT OF THE CASE.

Pursuant to its authority under an act of Congress, the Home Owners' Loan Act of 1933, 12 U.S.C. §1464 *et seq.* (''HOLA''), the Federal Home Loan Bank Board (''the Bank Board'') has promulgated a regulation, now 12 C.F.R. §545.8-3(f) and (g), expressly confirming (subject to certain restrictions not here relevant) the authority of a federally chartered savings and loan association to include in its mort-

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[2]The aforedescribed constitutional provisions, statutes and regulations are set forth, in full, at Appendix, pp. 8-18.

gage loan contracts and exercise according to its terms a provision, commonly known as a "due-on-sale" clause, permitting the association to declare the unpaid principal balance of a loan immediately due and payable in the event that the borrower transfers or conveys the real property hypothecated as security for the loan ("the federal 'due-on-sale' regulation").

A California statute, California Civil Code §711, as interpreted by the California Supreme Court in *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 582 P.2d 970, 148 Cal.Rptr. 379 (1978), proscribes the exercise of a "due-on-sale" clause as an unlawful restraint on alienation except when such exercise is required to prevent an impairment in the security for a loan.

In July of 1973 Robert A. and Lolita J. Noga ("the Nogas") executed in favor of San Diego Federal a promissory note in the original principal amount of $42,000; repayment of the note was secured by a deed of trust and assignment of rents in favor of San Diego Federal as beneficiary and California General as trustee upon a condominium unit located in Solana Beach, San Diego County, California ("the subject property"). The deed of trust contained a "due-on-sale" clause that provided as follows:

> "In the event of sale or transfer of any portion of the real property covered by this Deed of Trust, the entire balance of the principal and interest secured hereby shall, at the option of the holder hereof, become immediately due and payable."

In 1976 the Nalores — one of whom was a licensed real estate salesperson — purchased the subject property from the Nogas.

Since San Diego Federal had not consented to the transfer of the subject property to the Nalores, it declared the entire remaining principal balance of the subject loan due and

payable. When the unpaid principal balance of the loan was not paid, on or about June 29, 1977, San Diego Federal caused a notice of default and election to sell under deed of trust to be duly recorded and served.

The Nalores thereupon instituted the action below in the San Diego County Superior Court, No. N9152, against both San Diego Federal and California General. The gravamen of the action, which included causes of action for declaratory — relief, injunction, and slander of title, was that San Diego Federal's exercise of the "due-on-sale" clause had been improper.

On October 21, 1977, San Diego Federal timely removed the action from the San Diego County Superior Court to the Southern District Court pursuant to 28 U.S.C. §1441 on the ground that the action was one over which the court would have had original jurisdiction pursuant to 28 U.S.C. §1331 and 1337; and California General concurred in the removal.

Seven days later, on October 28, 1977, San Diego Federal and California General (1) answered the complaint, alleging, *inter alia*, that "the validity, force and effect of the 'due-on-sale' provisions contained in loan contracts used by federal savings and loan associations at all times herein relevant have been, and now are, governed exclusively by federal law which has preempted, and does now preempt, the application of any state law to determine any such matters"; and (2) counterclaimed for a declaratory judgment that California law cannot be applied to determine the validity or exercisability of "due-on-sale" clauses contained in San Diego Federal's loan instruments.

On November 4, 1977, the Nalores moved pursuant to 28 U.S.C. §1447(c) to remand the action to state court, contending that the Southern District Court lacked removal jurisdiction since, *inter alia*, "[t]he complaint herein does

not raise a federal question". The motion was denied. The Nalores later renewed their motion to remand to state court and again it was denied.

Approximately a year later, in June of 1979, San Diego Federal and California General, on the one hand, and the Nalores, on the other hand, filed cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure with respect to both the complaint and counterclaim. In July of 1979 the court granted the motion of San Diego Federal and California General and denied the motion of the Nalores. It held, *inter alia,* that (1) the Federal Home Loan Bank Board had properly concluded "that the ability to include 'due-on-sale' provisions in the mortgage loan documents of federal savings and loan associations, and the ability to use and exercise such provisions . . . is necessary for the 'full protection' of such federal savings and loan associations"; (2) that "[t]he right of a federally chartered savings and loan association to declare a loan due and payable when title to the property hypothecated as security for the loan has been transferred is governed exclusively by federal law, to the complete exclusion of state law"; and (3) that "[u]nder federal law San Diego Federal's exercise of the 'due-on-sale' clause" in this case "was valid and proper." (*Nalore* C.R. 49, pp. 8-9.) A final judgment was directed to be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

On appeal taken by the Nalores, the Ninth Circuit, on September 21, 1981, entered an opinion reversing the decision of the Southern District Court on the basis that the removal of the action from state court had been improper, reasoning as follows:

> "The Complaint presents a basis for relief that is entirely under state law. As such, San Diego Federal's federal preemption defense fails as ground for removal jurisdiction."

V.
REASONS FOR GRANTING THE WRIT.

A. Federal Law Constitutes the Law Governing, and Not Merely a "Defense" to, the Nalores' Claims.

In reaching its conclusion that the complaint herein does not "arise under" federal law for purposes of 28 U.S.C. §1441, the Ninth Circuit characterized federal preemption as constituting a "defense" to an otherwise valid state law claim.

This reasoning is erroneous. Conceptually, when preemption occurs state law in the preempted field is supplanted, not contradicted. Thereafter, any claim in the area is governed by federal law, and state laws governing similar matters are simply inapposite. As the United States District Court for the Southern District of New York, in denying a motion to remand, recently observed in *Billy Jack For Her, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers' Union*, 511 F.Supp. 1180, 1187 (S.D.N.Y. 1981):

> "Federal preemption is not, by its nature, an affirmative defense to a state law cause of action. In the Court's view, it is wiser to view the preemption doctrine as being analogous to a choice-of-law principle. That is, preemption analysis simply tells the court what law, state or federal, should be referred to in order to determine the plaintiff's right to relief in a given case.
>
> * * *
>
> "In a case of preemption, then federal law, by definition, provides the only basis for the plaintiff to gain the relief that it seeks, meaning that any time a court

> finds preemption it should conclude that the action arises under federal law."[3]

See also, e.g., *Hearst Corp. v. Shopping Center Network, Inc.*, 307 F.Supp. 551, 556 (S.D.N.Y. 1969):

> "True it is that, where the plaintiff has a right to relief *either* under federal law *or* under state law as an independent source of that right, the federal court on removal proceedings may not generally look beyond the face of the initial pleading in the state action to determine whether a federal question is presented. [Citation.] In certain areas, however, this either-or option is no longer available, for Congress has deemed that federal substantive law should altogether preempt and supplant state law."

With respect to the area of law at issue herein, it is petitioners' position that:

(1) Federal law preempts state law with respect to the mortgage lending practices of federal associations in general, see, *e.g., Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.* 445 U.S. 921 (1980) (federal law preempts state law with respect to the "fair lending" practices of federal associations); *First Federal Savings & Loan Association of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979) (federal law preempts state law with respect to the escrow account practices of federal associations); and *Meyers v. Beverly Hills Federal Savings & Loan Association*, 499 F.2d 1145 (9th Cir. 1974) (federal law preempts state law with respect

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[3]In reaching the opposite conclusion and in treating preemption as constituting a "defense" to a state law claim, the Ninth Circuit was, perhaps, unduly distracted by the perceived *result* of a preemption analysis. Compare *Billy Jack for Her, Inc., supra*:

> "[T]he doctrine of preemption is basically not concerned with guiding the substantive outcomes of cases, although it may often have an outcome-determinative effect." (511 F.Supp. 1187.)

to the prepayment charge practices of federal associations); and

(2) Federal law preempts state law with respect to the "due-on-sale" practices of federal associations in particular, see, *e.g.*, *Price v. Florida Federal Savings & Loan Association*, 524 F.Supp. 175 (M.D. Fla. 1981); *First Federal Savings & Loan Association of Gadsden County v. Peterson*, 516 F.Supp. 732 (N.D. Fla. 1981); *Collins v. First Federal Savings & Loan Association of Walla Walla*, No. C-80-334 (E.D. Wash., May 18, 1981); *First Federal Savings & Loan Association of Phoenix v. Development & Management Enterprises Inc.*, No. CIV 79-808 PHX-EHC (D. Ariz., April 2, 1981); *Dantus v. First Federal Savings & Loan Association of Denver*, 502 F.Supp. 658 (D. Colo. 1980); *Great Western Union Federal Savings & Loan Association v. Walters*, No. C 79-906V (W.D. Wash., June 18, 1980); *Williams v. First Federal Savings & Loan Association of Arlington*, 500 F.Supp. 307 (E.D. Val. 1980) *aff'd on other grounds*, 651 F.2d 910 (4th Cir. 1981); *Conference of Federal Savings & Loan Associations v. Stein*, 495 F.Supp. 12 (E.D. Cal. 1979), *rev'd on other grounds*, No. 79-4818 (9th Cir., Sept. 23, 1981); *Bailey v. First Federal Savings & Loan Association of Ottawa*, 467 F.Supp. 1139 (C.D. Ill. 1979); *Glendale Federal Savings & Loan Association v. Fox*, 459 F.Supp. 903 (C.D. Cal. 1978) and 481 F.Supp. 616 (C.D. Cal. 1979), *rev'd on other grounds*, No. 79-3573 (9th Cir., Sept. 23, 1981); and *Haugen v. Western Federal Savings & Loan Association of Denver*, 633 P.2d 497 (Colo.App. 1981).[4]

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[4]But see *de la Cuesta v. Fidelity Federal Savings & Loan Association*, 121 Cal.App.3d 328, 175 Cal.Rptr. 467 (1981), *prob. juris. noted*, No. 81-750 (U.S., Jan. 25, 1982).

Accordingly, the Nalores' claims, alleging an improper exercise by San Diego Federal of a "due-on-sale" clause, necessarily "arises under" federal law, regardless of what law is alleged by them to be applicable. Indeed, federal law constitutes no more of a defense to state law herein than it constitutes a defense to the laws of China — whether or not the Nalores allege that Chinese law is applicable.

B. Courts Are Sharply Divided Over Whether Preemption Causes a Claim Ostensibly Based on State Law to "Arise Under" Federal Law.

Federal courts are sharply divided over whether or not preemptive federal law will cause a claim that is ostensibly based on state law to "arise under" federal law for federal court jurisdictional purposes.

On the one hand, a number of courts have held that an action should be viewed to arise under federal law, despite the plaintiff's intention to plead only a state law claim, if the state law upon which plaintiff relies has been preempted by federal law. See, *e.g.*, *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *North Davis Bank v. First National Bank*, 457 F.2d 820, 823 (10th Cir. 1972); *Avco Corp. v. Aero Lodge No. 737, International Association of Machinists*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968); *Stone & Webster Engineering Corp. v. Isley*, 518 F.Supp. 1297 (D. Conn. 1981); *In re Wiring Device Antitrust Litigation*, 498 F.Supp. 79, 82-83 (E.D.N.Y. 1980); *Teamsters Local No. 116 v. Fargo-Moorhead Automobile Dealers Association*, 459 F.Supp. 558, 560 (D.N.D. 1978); *First Federal Savings & Loan Association of Jackson County v. First Federal Savings & Loan Association of Huntsville*, 446 F.Supp. 210, 212 (N.D.Ala. 1978); *Ashley v. Southwestern Bell Telephone Co.*, 410 F.Supp. 1389, 1392-94 (W.D. Tex. 1976); *New*

York v. Local 144, Hotel, Nursing Home & Allied Health Services Union, 410 F.Supp. 225, 229 (S.D.N.Y. 1976); *Rettig v. Arlington Heights Federal Savings & Loan Association*, 405 F.Supp. 819, 823 (N.D. Ill. 1975); *Gardner v. Clark Oil & Refining Corp.*, 383 F.Supp. 151, 152 (E.D. Wis. 1974).

On the other hand, such cases as *Guinasso v. Pacific First Federal Savings & Loan Association*, 656 F.2d 1364 (9th Cir. 1981), *pet. for cert. docketed*, No. 81-1386 (U.S. Jan. 21, 1982); *Home Federal Savings & Loan Association v. Insurance Department of Iowa*, 571 F.2d 423 (8th Cir. 1978); *Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972); *Johnson v. First Federal Savings & Loan Association of Detroit*, 418 F.Supp. 1106 (E.D. Mich. 1976); *Savings & Loan League v. Francis*, (E.D. Mich., May 8, 1980); and *Clark v. First Federal Savings & Loan Association of Lenawee County*, Civil Action No. 80-72492 (E.D. Mich. Aug. 19, 1980), have specifically held that federal preemption is a matter of defense to a state law claim and is, therefore, an inadequate base upon which federal question jurisdiction can rest.

In short, there is a divergence of authority with respect to the jurisdiction of federal courts in the area that only this Court can resolve.

C. It Is Important to Assure the Availability of a Federal Forum for Litigation Involving Preemptive Federal Law.

Review by this Court of the jurisdictional determination of the Ninth Circuit is important for purposes of assuring the availability of a federal forum for litigation involving preemptive federal law.

If the jurisdictional analysis of the Ninth Circuit is permitted to stand, then all cases asserting claims under state

law in areas governed by preemptive federal law will necessarily remain in state court. Under the same analysis, declaratory judgment actions initiated for purposes of ascertaining the contours of preemptive federal law will be dismissed for lack of jurisdiction on the basis that such actions present only "defenses" to state law. See generally *Madsen v. Prudential Federal Savings & Loan Association*, 635 F.2d 797 (1980), *cert. denied*, 101 S.Ct. 3007 (1981). As a result, virtually all litigation involving the scope and content of preemptive federal law will take place in state courts with no possibility of federal court consideration of the same issues — an obviously anomalous result.

VI.
CONCLUSION.

The petition for writ of certiorari should be granted.

Dated: February 1, 1982.

Respectfully submitted,

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Appendix

APPENDIX.

Decision of the Ninth Circuit.

John F. Nalore and Norma L. Nalore, et al., Plaintiffs/Appellants, v. San Diego Federal Savings and Loan Association, et al., Defendants/Appellees. No. 79-3481.

United States Court of Appeals, Ninth Circuit.

Argued July 16, 1981. Submitted July 27, 1981. Decided Sept. 23, 1981.

Rehearing and Rehearing En Banc. Denied Dec. 8, 1981.

Action was brought in state court seeking declaratory and injunctive relief as to mortgage lender's right to exercise due-on-sale clause, and mortgage lender removed the case to federal court. The United States District Court for the Southern District of California, Leland C. Nielson, J., entered summary judgment, and appeal was taken. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that mortgage lender's federal preemption defense failed as ground for removal jurisdiction where complaint asserted only that state law precluded due-on-sale clauses as restraints on alienation, and basis for relief complaint presented was entirely under state law.

Reversed and remanded with directions.

Fred Crane, Robert E. Boehmer, Mark A. Hiller, Riverside, Cal., for plaintiffs/appellants.

Aaron Peck, McKenna, Conner & Cuneo, Los Angeles, Cal., argued, for defendants/appellees; Terry O. Kelly, McKenna & Fitting, Los Angeles, Cal., on brief.

Appeal from the United States District Court for the Southern District of California.

Before WRIGHT, CHOY and FERGUSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

The Nalores purchased property in 1976, subject to San Diego Federal Savings and Loan Association's loan to the previous owners. The loan, negotiated in 1973 at 8% interest, was secured by a promissory note and trust deed with a due-on-sale clause.

In 1977 San Diego Federal demanded an increase in the interest rate and a transfer fee. It exercised the due-on-sale clause when the Nalores refused its demands.

The Nalores sought declaratory and injunctive relief in state court and obtained a temporary restraining order enjoining the foreclosure attempt.

San Diego Federal removed the case to federal court under 28 U.S.C. § 1441(b), asserting that the suit arose under federal law within the meaning of 28 U.S.C. § 1331(a), and under an act of Congress regulating commerce within the meaning of 28 U.S.C. § 1337.

The district court denied the plaintiffs' motion for remand and for injunctive relief. Finding that the Home Owners Loan Act of 1933, 12 U.S.C. §§ 1461-1468, preempted state prohibition of due-on-sale clauses, the court granted summary judgment to the defendants.

Plaintiffs appeal under 28 U.S.C. § 1291. They contend that the district court lacked jurisdiction because the original complaint relied entirely on California law.

San Diego Federal asserts that federal court jurisdiction lies in 28 U.S.C. § 1331(a) and in 28 U.S.C. § 1337. To invoke either section, federal law must constitute "a direct and essential element of the plaintiff's cause of action." *Smith v. Grimm*, 534 F.2d 1346, 1350 (9th Cir.), *cert. denied*, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976); *see United Air Lines v. Division of Industrial Safety*, 633 F.2d 814 (9th Cir. 1980); *Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662 (9th Cir. 1980);

Garrett v. Time-D.C., Inc., 502 F.2d 627 (9th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1569, 43 L.Ed.2d 778 (1975).

Our recent decision in *Guinasso v. Pacific First Federal Savings & Loan Association*, 656 F.2d 1364 (9th Cir. 1981), summarized the principles governing the removal of a suit to federal court. *Guinasso* presented virtually identical jurisdictional issues and is dispositive of the present appeal.

The Nalores assert only that state law precludes due-on-sale clauses as restraints on alienation. *See Wellenkamp v. Bank of America*, 21 Cal.3d 943, 148 Cal.Rptr. 379, 582 P.2d 970 (1978). The complaint presents a basis for relief that is entirely under state law. As such, San Diego Federal's federal preemption defense fails as ground for removal jurisdiction. *Guinasso v. Pacific First Federal Savings & Loan Association*, 656 F.2d 1364 (9th Cir. 1981); *Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 660 (9th Cir. 1972).

In *Guinasso* we concluded:

> The state claim asserted here contains no federal ingredient. . . . At most [federal law] foreclosed state regulation, in which case it would be a complete defense to the plaintiffs' claim, but still only a defense.

Guinasso v. Pacific First Federal Savings & Loan Association, 656 F.2d at 1367 (9th Cir. 1981).

For the same reason, we here conclude that the district court lacked jurisdiction. Its judgment is reversed and remanded, and the district judge will remand to the California courts.

REVERSED and REMANDED.

Decision of the Southern District Court.

United States District Court, Southern District of California.

John F. Nalore and Norma L. Nalore, Plaintiffs, v. San Diego Federal Savings and Loan Association, a corporation; California General Mortgage Service, Inc., a corporation; and Does 1-5, inclusive, Defendants.

San Diego Federal Savings and Loan Association, a federal savings and loan association, and California General Mortgage Service, Inc., a California corporation, Counterclaimants, v. John F. Nalore and Norma L. Nalore, Counterdefendants. Civil No. 77-0660-N.

Filed: July 12, 1979.

The cross-motions for summary judgment of defendants and counterclaimants San Diego Federal Savings and Loan Association ("San Diego Federal") and California General Mortgage Service, Inc. ("California General") (hereinafter San Diego Federal and California General shall be collectively referred to as "the defendants"), and of the plaintiffs and counterdefendants John F. Nalore and Norma L. Nalore ("the plaintiffs") which motions for summary judgment were made pursuant to Rule 56 of the Federal Rules of Civil Procedure, came on for hearing before this Court on June 25, 1979. The Court having read, heard and considered the various arguments and evidence presented by the parties, and having filed its Findings of Fact and Conclusions of Law that no genuine issues of fact exist with respect to the claims raised by the original Complaint in the instant action:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendants' motion for summary judgment is granted in accordance with the Court's Findings of Fact and Conclusions of Law filed concurrently herewith.

2. That the plaintiffs' motion for summary judgment is denied.

3. That plaintiffs herein take nothing against the defendants herein, or against either of them, by virtue of the original Complaint herein.

4. That as and for a further judgment in favor of San Diego Federal and California General, and each of them, the Court hereby declares and adjudges (i) that San Diego Federal has validly accelerated the indebtedness secured by the deed of trust which is the subject of this action by reason of the transfer and deeding of the real property covered thereby to plaintiffs, (ii) that nonpayment of said accelerated indebtedness was, and is, a default under said deed of trust and (iii) that San Diego Federal, as beneficiary thereunder, was, and is, free to pursue all remedies provided in said deed of trust and/or by law by reason of said default, including California General's exercise of the trustee's power of sale thereunder.

5. That the Court further declares and adjudges that plaintiffs' assertions and contentions, as set forth in Paragraphs 12 and 13 of the original Complaint herein, are without merit; and that the defendants' respective contentions as set forth in Paragraph 12 of the Answer are hereby declared and adjudged to be meritorious.

6. That, upon the defendants' First Counterclaim, this Court hereby declares and decrees (i) that California law does not apply to the validity, use and/or exercise of the "due-on-sale" provisions of San Diego Federal's loan contract documents; (ii) that the validity, use and/or exercise of such "due-on-sale" provisions is governed exclusively

by Federal Law; and (iii) that the Federal law applicable to the validity, use and exercise of such provisions does not incorporate California law.

7. Having determined that there is no just reason for delay in the entry of judgment herein as final judgment, the Clerk of this Court is hereby directed to enter this Judgment as a final judgment under F.R.C.P. Rule 54(b).

Dated: July 11, 1979.

/s/ Leland C. Nielsen
LELAND C. NIELSEN,
United States District Judge

Order Denying Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

John F. Nalore and Norma L. Nalore, Plaintiffs-Appellants, vs. San Diego Federal Savings and Loan Association, et al., Defendants-Appellees. No. 79-3481.

Filed: December 8, 1981.

Before: WRIGHT, CHOY and FERGUSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing, and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Article VI, Clause 2 of the United States Constitution ("The Supremacy Clause").

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article I, Section 8, Clause 3 of the United States Constitution ("The Commerce Clause").

"[Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(a):

As originally enacted:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Home Owners' Loan Act, ch. 64, §5(a), 48 Stat. 132 (1933).)

In its present form:

> "(1) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' or 'Federal mutual savings banks' (but only in the case of institutions which, prior to conversion, were State mutual savings banks, located in States which authorize the chartering of State mutual savings banks, provided such conversion is not in contravention of State Law), and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. An association which was formerly organized as a savings bank under State law may not convert from the mutual to the stock form of ownership. An association which was formerly organized as a savings bank under State law may not convert from the

mutual to the stock form or ownership. An association which was formerly organized as a savings bank under State law may, to the extent authorized by the Board, continue to carry on any activities it was engaged in on December 31, 1977, and to retain or make any investments of a type it held on that date, except that its equity, corporate bond, and consumer loan investments may not exceed the average ratio of such investments to total assets for the five-year period immediately preceding the filing of an application for conversion and such an association which was formerly organized as a savings bank under State law shall only be permitted to establish branch offices and other facilities in accordance with the limitations imposed by State law controlling applications of a savings bank organized under such State law, provided that such an association: (A) shall be exempt from any numerical limitations of State law on the establishment of branch offices and other facilities, and (B) may, in any case, subject to the approval of the Board, establish branch offices and other facilities in its own Standard Metropolitan Statistical Area, its own county or within thirty-five miles of its home office, but only in its State of domicile. An association which was formerly organized as a savings bank under State law shall be subject to the requirements of State law (including any regulations promulgated thereunder and any sanction of the violation of any such law or regulation) in effect at the time of conversion, in the State of its original charter —

(A) pertaining to discrimination in the extension of home mortgage loans or adjustment in the terms of mortgage instruments based on neighborhood or geographical area,

(B) pertaining to requirements imposed under the Consumer Credit Protection Act,

if the Board determines that State law and regulations impose more stringent requirements than Federal law and regulations.

(2) A Federal mutual savings bank may make commercial, corporate, and business loans except that —

(A) not more than 5 per centum of the assets of such a bank may be so loaned; and

(B) such loans may only be made within the State where the bank is located or within 75 miles of the bank's home office.

(3) In addition to the authority conferred by paragraph (1), Federal mutual savings bank may accept demand deposits in connection with a commercial, corporate, or business loan relationship." (12 U.S.C.A. §1464(a) (1980).)

12 C.F.R. §545.8-3(f) and (g) (1981).*

"(f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract."

"(g) *Limitations on the exercise of due-on-sale clauses.* With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument, (ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; and

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*The Federal Home Loan Bank Board's "due-on-sale" regulation, originally promulgated as 12 C.F.R. §545.6-11(f) and (g), was renumbered as 12 C.F.R. 545.8-3(f) and (g) in 1979. See 44 Fed. Reg. 39,108 (1979) and 44 Fed. Reg. 57,386 (1979).

(3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest."

California Civil Code §711.

"Conditions restraining alienation, when repugnant to the interest created, are void." (Cal. Civ. Code §711 (West 1954).)

28 U.S.C. §1331.*

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

"(b) Except when xpress provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

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*The version of this statute quoted above was in force in 1977, when the action was commenced. It has since been amended in respects not material hereto.

28 U.S.C. §1337.*

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

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*The version of this statute quoted above was in force in 1977, when the action was commenced. It has since been amended in respects not material hereto.

28 U.S.C. §1441.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

Opposition

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No. 81-1462
IN THE

Supreme Court of the United States

October Term, 1981

GREAT AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION, and CALIFORNIA GENERAL MORTGAGE SERVICE INC.,

Petitioners,

vs.

JOHN F. NALORE and NORMA L. NALORE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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Question Presented.

When an action is filed in State Court, based entirely on state real property and mortgage law, can the action be removed to Federal Court solely because a preemptive defense is asserted against it?

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No. 81-1462

IN THE

Supreme Court of the United States

October Term, 1981

GREAT AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION, and CALIFORNIA GENERAL MORTGAGE SERVICE INC.,

Petitioners,

vs.

JOHN F. NALORE and NORMA L. NALORE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

The Respondents JOHN F. NALORE and NORMA L. NALORE (hereafter "the Nalores"), respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Court of Appeal for the Ninth Circuit in this case. The opinion is reported at 663 F.2d 841 (9th Cir. 1981).

I.
STATEMENT OF THE CASE.

The Nalores are satisfied with Petitioners' (hereafter "Great American Federal") summarization of the facts and procedural aspects of the action herein.

II.
REASONS WHY THE WRIT SHOULD BE DENIED.

A. The Grounds for Removal of an Action Are Well Established by This Court.

The predominant statement regarding removal jurisdiction was pronounced by this Court almost fifty years ago in *Gully v. First National Bank*, 299 U.S. 109 (1936).

This Court has consistently held that, in order for removal jurisdiction to exist, a claim must arise "under the Constitution, laws, or treaties of the United States." "A right or immunity created by the Constitution or the laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank, supra*, 299 U.S. 109, 112 (1936).

The federal claim "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." (Citations omitted.) *Gully v. First National Bank, supra*, 299 U.S. 109, 113 (1936).[1]

In determining the scope of removal jurisdiction, this Court has consistently followed the rule set forth in *Gully*. See, *e.g.*, *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974); *Pan American Petroleum Corp. v. Superior Court of Delaware For New Castle County, et al.*, 366 U.S. 556 (1961); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

Respondents respectfully submit that the rule set forth in *Gully* is applicable to this action.

B. The Court of Appeal's Decision Is Consistent With the Principles Established by This Court.

The Ninth Circuit Court of Appeal has repeatedly confirmed the principles of removal jurisdiction established by this Court. See, *e.g.*, *Guinasso v. Pacific First Federal*

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[1] In a petition involving removal jurisdiction, it is surprising that petitioners failed to discuss the rule established in *Gully, supra*.

Savings and Loan Association, 656 F.2d 1364 (9th Cir. 1981). See also, *United Air Lines v. Division of Indus. Safety, Etc.*, 633 F.2d 814 (9th Cir. 1980); *Garrett v. Time-D.C., Inc.*, 502 F.2d 627 (9th Cir. 1974), *cert. denied*, 421 U.S. 913; *State of Washington v. American League of Prof. Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972).

The Court of Appeal ordered this action remanded to State Court for lack of removal jurisdiction to Federal Court. The Court held that the Nalores' complaint presents a claim for relief that arises entirely under state law.

The basis of the complaint, which included causes of action for declaratory relief and injunction, was that Great American Federal's[2] automatic exercise of the due-on-sale clause is in violation of California Civil Code §711 as interpreted by *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 148 Cal.Rptr. 379. As such, Great American Federal's claim of preemption merely raises a defense and fails as ground for removal jurisdiction.

The Court of Appeal's finding in this case is entirely consistent with this Court's established principles on removal jurisdiction.

C. Petitioners Have Shown No Reason to Modify the Long-Standing Principles of Removal Jurisdiction.

Great American Federal attempts to invoke this Court's attention, claiming that federal courts are "sharply divided" over the issue of removal jurisdiction.

Great American Federal relies on a number of cases wherein federal preemption was allowed to serve as a basis for removal jurisdiction (see petitioner's Writ of Certiorari,

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[2]Great American Federal Savings and Loan Association is referred to as San Diego Federal Savings and Loan Association in the opinions below.

at p. 9). A review of the cases cited by Great American Federal reveals that those actions arise under Section 301 of the Labor Management Relations Act, or are cases in which §301 was misapplied. Congress has conferred original jurisdiction to the federal district courts under §301 and provided procedural remedies under §301(b). Hence, §301 cases are properly removed to federal court since the claim clearly arises under federal law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

Petitioners herein make no argument that Congress intended to provide jurisdiction in the present case. More particularly, Great American Federal has made no argument to show that Congress has provided *any* federal remedies, procedural or otherwise, to the contract dispute between the Nalores and Great American Federal Savings and Loan Association. Therefore, petitioners claim that "courts are sharply divided over whether preemption causes a claim ostensibly based on state law to 'arise under' federal law" is simply not true. The Nalores submit that these arguments are without support.

Great American Federal argues that whenever a preemptive defense is asserted, the district court should look beyond the fact of the initial state court pleading to determine whether a federal question is presented. This argument fails for two reasons. First, it contradicts the principle established in *Gully* that the district court should look only to the face of the complaint to determine jurisdiction. *Gully v. First National Bank*, 299 U.S. 109, 113 (1936). Secondly, the argument fails in that it recommends that district courts consider the merits of an action to enable it to determine proper jurisdiction.

Consequently, other than Great American Federal's erroneous reliance on cases involving §301 of the Labor Man-

agement Relations Act, petitioners have shown no reason to modify the long-standing principles of removal jurisdiction.

D. Congress Has Not Expanded Removal Jurisdiction to Include State Law Claims Against Which a Federal Preemption Defense Is Asserted.

Great American Federal suggests that a district court should determine the real nature of an action and to assume jurisdiction if it finds that the dispositive issue is one of federal law. (See petitioner's Writ of Certiorari at p. 6.) Balanced against such an approach are the continually increasing case loan of the federal courts and the concomitantly increasing competence of the state courts to decide federal issues. The resolution of this balance is the domain of Congress. Furthermore, the established removal procedure reflects a Congressional decision to severely limit the right to remove a state action to federal court. See *La Chemise La Coste v. Alligator Co., Inc.*, 506 F.2d 339, 344; 28 U.S.C. §1441.[3]

Congress could, if it deemed appropriate, grant defendants the right to remove an action if they assert a preemptive defense to a state law claim. Congress has not chosen to do so. Therefore, the asserted defense of preemption does not give rise to federal jurisdiction in this action. Preemption may offer a valid defense to the Nalores' state law claim arising under California Civil Code §711, but the proper forum in which to raise that defense is the state court.

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[3]The federal district courts would become unduly burdened with cases wherein meritless preemption defenses would be raised simply to invoke the district court's jurisdiction.

CONCLUSION.

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents.